

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD ROSS)	
Claimant)	
VS.)	
)	Docket No. 172,215 and
WALLACE ENERGY, d/b/a)	172,216
WALLACE OIL RECLAIMING)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested Appeals Board review of a Review and Modification Award entered by Administrative Law Judge Bruce E. Moore on December 7, 1995. The Appeals Board heard argument by telephone conference on April 4, 1996.

APPEARANCES

Claimant appeared by and through his attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jerry M. Ward of Great Bend, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, William W. Jeter appearing for Jerry Moran of Hays, Kansas.

RECORD

The Appeals Board has reviewed and considered the record listed in the Award.

ISSUES

The respondent raised the following issue before the Appeals Board:

- (1) Whether the Appeals Board has jurisdiction to review the Review and Modification Award.

Claimant, in his application for review, listed the following issues:

- (2) Whether claimant was entitled to post-award medical treatment.
- (3) Whether claimant's attorney is entitled to a larger award of attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and arguments of the parties, the Appeals Board finds as follows:

- (1) This is a post-award proceeding brought by the claimant on an Application for Review and Modification filed before the Administrative Law Judge on February 28, 1995. The original Award was entered by Administrative Law Judge George R. Robertson on November 1, 1993, and modified by a Nunc Pro Tunc Award dated November 3, 1993. That Nun Pro Tunc Award was timely appealed to the Appeals Board. The Appeals Board entered an Order on January 5, 1994, and a subsequent Nunc Pro Tunc Order on April 26, 1994, that modified the Administrative Law Judge's Award. The Administrative Law Judge's Award and the Appeals Board's Order contained language in reference to future medical treatment that "claimant is awarded future medical expenses upon proper application and approval by the Director." In claimant's application, he requested medical treatment from Dr. Kevin R. Davidson, chiropractor, practicing in Hays, Kansas. Claimant alleged such medical treatment was necessary to cure the effects of his original work-related accident, which injured his neck and low back.

Claimant's request for future medical treatment was first made during a preliminary hearing which was held before the Administrative Law Judge on February 16, 1995. As a result of that hearing, Administrative Law Judge George R. Robertson denied additional medical in his Order dated February 24, 1995. Claimant followed that Order with an Application for Review and Modification, which is the subject of this appeal. Again claimant alleged that he was in need of medical treatment to cure the effects of his original injury. In lieu of having another full hearing on that issue, the parties agreed the preliminary hearing transcript of February 16, 1995,

would be substituted for a regular hearing. Additional evidence was submitted by the claimant in an evidentiary deposition of Kevin R. Davidson, D.C., on September 12, 1995. Administrative Law Judge Bruce E. Moore then entered the Review and Modification Award on December 7, 1995. The medical treatment request was denied by the Administrative Law Judge and an award was made to claimant's attorney in the amount of \$500 for services performed in an effort to obtain the post-award medical treatment.

The first issue to be addressed in this appeal is respondent's argument that the Appeals Board does not have jurisdiction to review the Review and Modification Award. Respondent contends that claimant cannot request post-award medical treatment pursuant to the preliminary hearing statute and, after such request is denied, file an Application for Review and Modification requesting the same benefits. The Appeals Board disagrees with respondent's argument. Respondent is correct that the Appeals Board would not have jurisdiction to review a post-award request for medical treatment pursuant to the preliminary hearing statute, K.S.A. 44-534a, as amended. However, an Application for Review and Modification is a final award and is, therefore, reviewable by the Appeals Board pursuant to K.S.A. 44-551(b)(1), as amended.

(2) The Administrative Law Judge denied claimant's request for medical treatment finding that the claimant had not presented evidence that proved claimant's medical condition had changed from the time of the original award. Any modification of an award has to be based on the existence of new facts or a changed condition which renders the former award either excessive or inadequate. The party asserting change in condition has the burden of proof. See Gile v. Associated Co., 223 Kan. 739, 740-741, 576 P.2d 663 (1978).

The Appeals Board agrees with the analysis and conclusion of the Administrative Law Judge that claimant failed to prove that claimant's medical condition had changed from his medical condition at the time the original award was entered. The Appeals Board finds that the Administrative Law Judge's findings and conclusions concerning this issue are accurate and appropriate. It is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the findings and conclusions of the Administrative Law Judge as its own as if specifically set forth in this Order.

(3) The Administrative Law Judge granted claimant's request for post-award attorney fees as provided in K.S.A. 44-536(g). However, claimant asserted that the Administrative Law Judge's award of attorney fees in the amount of \$500 was inadequate. Claimant filed an affidavit before the Appeals Board requesting attorney fees in the amount of \$2,168. Claimant argued that the respondent and the Fund had represented they were going to present additional evidence in the case and failed to do so. While the claimant was waiting for this evidence to be presented, the Award was entered before the claimant had an opportunity to submit an affidavit requesting attorney fees.

The Appeals Board only has jurisdiction to review findings, orders, and awards of the Administrative Law Judge. See K.S.A. 44-551(b)(1), as amended. Therefore, absent the agreement of the parties, the claimant's affidavit requesting attorney fees cannot be originally

submitted before the Appeals Board. The Appeals Board finds that the attorney fee issue should be remanded to the Administrative Law Judge for the Administrative Law Judge to consider claimant's affidavit of attorney fees filed by the claimant's attorney, including any additional time expended in connection with this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated December 7, 1995, that denied claimant's request for medical treatment should be affirmed and the award of \$500 to claimant's attorney for services performed should be reversed and remanded.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Jerry M. Ward, Great Bend, KS
Jerry Moran, Hays, KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director